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No. 87-1061

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEVADA

REPLY BRIEF FOR THE PETITIONER

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Six years ago, in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), this Court clarified the two elements of proof that a plaintiff must satisfy in order to sustain a claim against a private defendant under the Fourteenth Amendment or 42 U.S.C. § 1983. Those two requirements go right to the heart of the "state action" and "color of state law" questions, especially in cases such as this, where the central focus of the dispute is on enforcement of a regulation or rule.

The plaintiff must show first that the claimed deprivation has "its source in state authority" (457 U.S. at 939) and second that the defendant is "a person who may fairly be said to be a state actor." (457 U.S. at 937). The Court in *Lugar* also emphasized that, "[a]lthough related, these two principles are not the same." *Id.*

This simple, yet comprehensive two-part test is first concerned with the source of the rule being enforced, and second with the character of the actor enforcing the rule. It imparts a measure of stability, certainty and predictability that would not otherwise be available were the Court to proceed simply by case-to-case adjudication as existed to some degree prior to *Lugar*, and as respondent would have it.

The respondent has, in effect, put all of his eggs into the second prong basket. He virtually ignores the first requirement, that the substantive rule of decision be governmental rather than private. Though he says it in different ways, respondent's three arguments that the NCAA and UNLV are "joint participants" are directed only to the second of the two relevant requirements.

Although the respondent's "joint participation" arguments are not sufficient to show the kind of intertwining between state and private actors that the second prong requires, the Court need never reach that issue, because the case can be decided on a much narrower ground. The Court meant what it said in *Lugar* that the plaintiff must show *both* that the rule of decision springs from a governmental and not a private source, and also that the enforcer is a state actor.

By ignoring the first prong of *Lugar*, respondent vitiates the important rationale underlying that test for limiting the scope of the state action doctrine. The *Lugar* doctrine recognizes that important associational rights are subject to infringement if courts can too readily impose constitutional obligations upon a private group's decision-making processes. 457 U.S. at 936. The first prong of *Lugar* serves as a bulwark against such intrusions by per-

mitting private associations to operate without judicial interference so long as their decisions are based upon private norms and not state law. Because it is obvious that the NCAA's rules were adopted by the membership without governmental encouragement or coercion, and not even the respondent seriously contends that the first prong of the *Lugar* test has been satisfied, the judgment of the Nevada Supreme Court must be reversed on that ground alone.

I. TARKANIAN HAS NOT SHOWN THAT THE NCAA's ACTION IS ATTRIBUTABLE TO A STATE RULE OF DECISION.

The issue before the Court is whether the NCAA engaged in state action when it directed UNLV to show cause why it would not be an appropriate corrective action for the University to suspend temporarily Tarkanian from his intercollegiate athletic coaching duties for his involvement in UNLV's violations of NCAA rules.[1] UNLV and Tarkanian violated rules which were adopted by the members of the NCAA. It was those rules which authorized the directive to UNLV to show cause.

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1. No specific reply is needed to respondent's "Statement of the Case" for, although it seriously mischaracterizes the facts, they are, by and large, irrelevant to the sole issue accepted for certiorari, i.e., state action. We mention, however, one example of the twisting and torturing of the facts to which respondent resorts. He states at page 13, n.16 that "at least one NCAA Committee member frankly admitted he had made up his mind against UNLV before any hearings took place because of UNLV's attacks upon the NCAA staff." The citations to the record do not support this. The Committee member's testimony indicates neither that he made a decision prior to hearing, nor that UNLV's criticism of the NCAA staff was a basis of decision on the merits of the inquiry. This tactic of mischaracterizing facts also occurred before the NCAA Committee, which perhaps influenced its findings. This tactic continues today, as can be seen in respondent's rewriting of the Question Presented in his brief to this Court.

It is undisputed that the NCAA is a private association. No university or college is obliged to join, and many choose not to. A member, by becoming such, subjects itself to the power of the association to adopt and enforce association rules. As with any voluntary association, membership is a privilege which the association may accord or withhold as its members by rule dictate.

It is further undisputed that the privileges and rights of membership are extended to any four year school that agrees to the obligations and duties set forth in the NCAA Constitution and Bylaws (J.A. 82); that all members agree to administer their intercollegiate athletic programs, including basketball, in accordance with the Constitution and Bylaws (J.A. 82); and that procedures for disciplinary or corrective actions against members are provided in the NCAA Constitution (J.A. 83). Tarkanian has admitted that he knew and understood NCAA rules when he arrived at UNLV, and that he was responsible for insuring UNLV's intercollegiate basketball program was in compliance with those rules (Tr. XI 2830, VIII 1981). It is undisputed that UNLV, in part because of the actions of Tarkanian, was found by a duly appointed Committee to have violated those rules, and that the various sanctions were imposed on UNLV, a member, and not on Tarkanian. Tarkanian concedes that the NCAA did not sanction him. His brief states, "UNLV, a state actor, not the NCAA suspended him." Respondent's Brief, p. 22.

The relevant question under the first prong of the *Lugar* test, then, is whether petitioner, in imposing sanctions against UNLV, acted under authority of state law. Respondent attempts to avoid this inquiry on the ground that "there is no question there was state action - UNLV,

not the NCAA, suspended Tarkanian." Respondent's Brief, p. 31.[2] In support of this theory, respondent cites a number of cases in which, he says, the "joint participation" of the State and a private party alone established state action. *See Tulsa Professional Collection Services, Inc. v. Pope,* 108 S.Ct. 1340 (1988); *Lugar, supra; Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948). However, every one of these cases is a paradigmatic example of private exercise of a right or privilege *created* by the State, and there-

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2. Respondent argues, as he must, that the Court explicitly limited the *Lugar* two-prong test to prejudgment attachment cases. Respondent's Brief, pp. 25-26, n.20. The language which respondent cites, however, states only that the particular "joint action" which the Court found sufficient to satisfy the "state action" prong of the *Lugar* test in the prejudgment attachment context might not serve the same purpose in other contexts. *Lugar,* 437 U.S. at 939, n.21.

Tarkanian concedes, however, that *Lugar* applies principles developed by this Court in previous cases. Respondent's Brief, p. 26. These earlier cases illustrate that the inquiry into the source of the relevant law (that is, the rule of decision) is crucial to the application of § 1983. In *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), the discriminatory guest policies involved were those of a private lodge, and this Court held that there was no state action. In *Polk County v. Dodson,* 454 U.S. 312 (1982), there was no state action by a public defender where the relevant rule of decision had its source in the canons of professional responsibility. In *Lugar,* the rule of decision was a state statute, and the Court held that there was state action.

Recent opinions of this Court continue to probe the source of authority. In *Tulsa Professional Collection Services, Inc. v. Pope,* 108 S.Ct. 1340 (1988), on which respondent relies, the source of governing law was an Oklahoma statute. Most recently, in *West v. Atkins,* 56 U.S.L.W. 4664, 4666 (U.S., June 20, 1988), the two-prong *Lugar* test was applied to find a prison physician liable under § 1983. This Court noted that the defendant must have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." The prison physician was found to be a state actor because he was a state employee acting within the scope and course of his employment. None of these cases involved prejudgment attachment, and it is readily apparent that the two-prong test of *Lugar* was not intended to be, and is not, limited to such actions.

fore the first prong of *Lugar* was easily satisfied. Under these holdings, state action does not exist solely because a private party somehow "participates" in the State's activity. Rather, the inquiry is whether the private party's own participation occurred under state authority.[3]

The determination of whether a private party acts under color of state law is particularly important in a case such as this. This entire controversy centers on the action taken by the NCAA pursuant to its avowed purpose of promoting sportsmanship, scholarship and amateurism in intercollegiate athletics. It is undisputed that neither the State of Nevada nor any other state influenced or coerced either the adoption of Association rules or the NCAA's decision that UNLV and Tarkanian violated them. That is simply not a decision for which the state is responsible, although it may have reacted to it. Whether the school affected is UNLV, or Wake Forest, or any other of the hundreds of member institutions, the standards are the same. They were adopted by vote of the members of the Association, and they are enforced by the Association. Clearly, the NCAA took no action under the authority of any state law.[4]

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3. Respondent also cites *Dennis v. Sparks*, 449 U.S. 24 (1980), in which the Court held that private parties who conspired with a judge to deprive another of his property could be sued for conspiracy to violate § 1983 even though the judge enjoyed immunity. Because the decision in *Dennis v. Sparks* focused on the conspiracy, rather than the source of law being applied, it is not surprising that the Court's opinion, authored by Justice White, was "not referenced in his opinion for the Court in *Lugar* decided less than two years later." Respondent's Brief, p. 29. *Dennis* is simply not relevant where, as here, there is no allegation of conspiracy.

4. Both the respondent and the Nevada Supreme Court attach significance to the fact that the school involved in this

(Continued on following page)

The "joint participation" issue posed by respondent was decided by this Court six years ago, in *Blum v. Yaretsky*, 457 U.S. 991 (1982). Similar to respondent's contention here, the petitioner in *Blum* argued that constitutional restraints should be imposed upon the entire decision-making process leading to an adjustment of Medicaid benefits. This Court, however, reviewed each participant's decision separately, applying traditional state action analysis to each, and concluded that, although the state responded to medical decisions of private physicians by adjusting Medicaid benefits, this did not render the state "responsible" for those medical decisions. 457 U.S. at 1005. The medical decisions about which the Medicaid patients complained were made by physicians exercising "medical judgment . . . according to professional standards that are not established by the state," *id.* at 1008, and were therefore not made "under color of state law." In *Blum*, as here, there was no suggestion that the state influenced the physicians in any way in adjusting the degree of medical care, "although it clearly responds to it." *Id.*, n.19. The physicians may have erred in their decision to lower the degree of care, but that fault was not of constitutional concern.

In sum, the law is clear, despite respondent's arguments to the contrary, that a private party's action under the

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Footnote continued—

particular case is public rather than private. This is truly a distinction without a difference. Whether the NCAA's promulgation and enforcement of its standards are to result in lawsuits under the Fourteenth Amendment or § 1983 cannot depend on the fortuity of whether those standards are enforced against public or private schools. This argument simply emphasizes the fact that this case involves nothing more than a private association setting its own standards for membership and continued participation, and then taking steps to implement those standards.

authority of state law is an essential element of a state action claim. Respondent has made no effort to show, and cannot show, that petitioner's action had its source in a state rule of decision. For this reason alone, petitioner could not have been a state actor subject to the restrictions of the Due Process Clause.

II. TARKANIAN HAS NOT SHOWN THAT THE NCAA IS A STATE ACTOR.

Even if it could somehow be shown that the NCAA acted under state law, Tarkanian's action must fail, for *Lugar* requires that he show "something more." *Lugar*, 457 U.S. at 939. This second test focuses on the nature of the relationship between the private actor and the state. Tarkanian advances three arguments in this regard. First, he contends that "the NCAA utilized state officials to enforce its determination that Tarkanian be suspended without due process of law." Respondent's Brief, p. 24. He supports this argument with confusing assertions concerning "overt official involvement." Respondent's Brief, pp. 25-28. However, as the authorities on which he relies reveal, overt official involvement is considered only when a state statute is involved. *See, e.g., Tulsa Professional Collection Services, supra; Lugar, supra; Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). Furthermore, there can be no overt official involvement here. UNLV at most acquiesced in the NCAA's recommended corrective action. Otherwise it actively opposed the NCAA's actions. At bottom, respondent's first argument appears to depend upon the assumption that the relevant "state action" is UNLV's suspension of Tarkanian. Because the issue here is the NCAA's imposition of sanctions, not UNLV's response to those sanctions, this argument must fail.

Tarkanian's second argument is that the NCAA is exercising a power traditionally reserved to the states, the power to discipline state employees.[5] Again, the two-tiered decision-making process in this case refutes his argument. The NCAA does not discipline the employees of its members. Rather, it sets minimum standards for the conduct of intercollegiate athletic programs for members that wish to remain in good standing with the Association, and recommends to member institutions appropriate corrective action when athletic personnel fail to comply with those standards. Because the NCAA is a voluntary Association, the decision to accept or reject a recommendation rests exclusively with the member.

Here, the Association found UNLV in violation of its standards, and determined that an appropriate corrective action would include the two year suspension of Tarkanian. That decision did not suspend Tarkanian nor could it have. The NCAA did not have "the weight of the state behind [its] private decision." *Lugar*, 457 U.S. at 940. UNLV did not clothe the NCAA with the power of authority to act against its employees. Tarkanian admits the NCAA did not and could not suspend him. Respondent's Brief, p. 28. UNLV "reacted" to the Association's decision by suspending Tarkanian.

Indeed, Tarkanian concedes that UNLV had other options besides suspending him. Respondent's Brief, p. 17.

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5. The contention that disciplining state employees is a "traditionally exclusive state function" trivializes the public function doctrine, for a state always acts for itself. Under respondent's analysis, one who builds state roads, sells equipment to the state or even cuts state lawns would become a delegee of a "traditionally exclusive state function." This Court has stated its reluctance "to extend the sovereign-function doctrine outside of its present carefully confined bounds." *Flagg Brothers, Inc. v. Brooks*, 436 U.S. at 163. This case presents no occasion for deviation from that prudent rule.

As the UNLV Hearing Officer noted, the University had at least three options, only one of which involved Tarkanian's suspension. The University could (1) reject the NCAA's recommendation and risk the imposition of alternative penalties which might or might not involve Tarkanian; (2) accept the NCAA's recommended corrective action and suspend Tarkanian from NCAA-governed sports; or (3) "[p]ull out of the NCAA completely . . ." Respondent's Brief, pp. 22, 31.[6] It was the University, not the NCAA, which exercised the function of disciplining a state employee. UNLV has delegated nothing to the NCAA. Rather, it has chosen to abide by the rules it and other colleges and universities adopted in order to participate in intercollegiate athletics.[7]

This does not mean that the NCAA does not have leverage over institutions or their coaches, students or other representatives. To insure that members and their representatives abide by membership rules, the Association must have the ultimate power to revoke the privileges of membership. This is not, however, the power to discipline a state employee.

An argument virtually identical to the respondent's argument that the NCAA performs a function traditionally and exclusively reserved to the state was rejected

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6. The fact that UNLV admittedly had at least three options, only one of which involved compliance with the NCAA's decision, undermines respondent's argument that the University was contractually bound to suspend Tarkanian.

7. The fact that UNLV may be subject to further sanctions by the NCAA is of little import. In *Blum*, the states administering Medicaid rules were also subject to federal sanctions (including termination) for failure to monitor health care needs of patients, as were the private nursing homes. This Court discounted the import of those potential sanctions. 457 U.S. at 1009-10. *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (regulated monopolist is not for that reason alone subject to constitutional restraints on otherwise private conduct).

in *Blum*. The regulation of state and federal Medicaid programs is undoubtedly a function traditionally and exclusively the prerogative of the government. Yet the Court found that day-to-day decisions of nursing homes, which affect the patient's right to receive Medicaid benefits, are not the kinds of decisions traditionally and exclusively made by government. 457 U.S. at 1012. That the government responds to those decisions by adjusting the patient's benefits "does not render it responsible for those actions." *Id.* at 1005.

Here the NCAA's function is the governance of intercollegiate athletics for member institutions, which is not a function traditionally and exclusively reserved to the government. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971, 2985 (1987). As in *Blum*, the fact that the State may respond to the NCAA's action by disciplining an employee does not mean that the NCAA itself exercises the state's function.[8]

The respondent assures us that "holding that the NCAA is a state actor will not subject to § 1983 liability other private persons—concerned citizens, media, consultants—who also seek to influence state decisions." Respondent's Brief, p. 46, n.38. How can he make that assurance? His only standard appears to be "joint participation." The contexts within which joint participa-

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8. Respondent's reliance upon the White Primary Cases is wholly misplaced. Respondent's Brief, pp. 35-37. There simply is no comparison between a State's attempt to exclude minorities from a meaningful right to vote by allowing a "voluntary" association to serve as an obstacle to access to the electoral process and a college's decision to abide by a private association's rules as a condition of playing men's basketball with other members of that association. Clearly, there is a large difference between deciding who is going to vote and who is going to coach basketball.

tion between state and private parties may be found is virtually limitless. Obvious examples are private agencies which set accrediting standards for schools, hospitals and other public institutions, such as the American Bar Association, the American Medical Association and organizations that administer entrance exams, such as the Law School Aptitude Test. Are they to be deemed state actors as well? In the narrow context of athletics, are booster groups, alumni groups and paid consultants, which often provide input that results in the hiring and firing of coaches, "joint participants" with states within the context of state action? Is Stanford University a state actor because it chooses not to add UNLV to its basketball schedule while Tarkanian continues to coach there? The respondent's call for an *ad hoc* determination leaves little insight into the predictability of such an outcome.

For these reasons, we submit that the respondent's characterization of this case as involving a state's delegation of personnel decisions to a private entity is neither factually nor legally correct. He cites no document, statute or rule illustrating any delegation by UNLV to the NCAA. He points only to UNLV's reaction in suspending him. He admits that only UNLV could sanction him, and acknowledges that it had other alternatives. He does not dispute that member schools, through the NCAA, establish rules under which they will continue to compete with UNLV. In short, his quarrel lies with his employer, UNLV, not the NCAA.

Respondent's third argument, that under *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) there is a "symbiotic relationship"[9] between the Association

9. This theory was not argued or briefed by Tarkanian in the court below, and was not addressed by that court.

and the University is also misplaced. First, as noted in petitioner's opening brief, the relationship here was not symbiotic but rather antagonistic.[10] Second, the respondent concedes that this doctrine has been rarely invoked. Respondent's Brief, p. 43. As this Court's decision in *Blum*, 457 U.S. at 1010-11, and *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) indicate, the doctrine has no application where one entity sets and enforces standards which are followed by another.

Tarkanian concludes that the injunction against UNLV is final and cannot be dissolved by this Court because the University did not appeal to the Nevada Supreme Court. Respondent's Brief, p. 47, n.39.[11] However, it is established that in equity cases this Court has power to fashion complete relief. *Albermarle Paper Company v. Moody*, 422 U.S. 405, 418-19 (1975); *Porter v. Warner Holding Company*, 328 U.S. 395, 398 (1946); *Bell v. Hood*, 327 U.S. 678, 684 (1946). *See also* 28 U.S.C. § 1651. Specifically, this Court's power to dissolve an injunction against a party who has not appealed is illustrated by *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 180 (1972), where an injunction against the Pennsylvania Liquor Authority and the Moose Lodge was dissolved, although only the Moose Lodge had appealed. Complete relief in this Court requires that the injunction against UNLV, as well as the NCAA, be lifted.

10. This is illustrated by UNLV's granting tenure to Tarkanian on July 1, 1977, after the NCAA Committee on Infractions had made its determination implicating Tarkanian in violations of its rules. Respondent's Brief, p. 1. The adversarial relationship is further demonstrated by the fact that UNLV did not appeal the injunction against it prohibiting Tarkanian's suspension.

11. Respondent cites several cases which hold that this Court will not consider issues not advanced or considered in the court below. That situation does not exist here. The NCAA challenged the entire injunction in its appeal to the court below, and that court responded by modifying the entire injunction. Tarkanian did not argue against the modification below, and did not seek review of that modification here.

CONCLUSION

For these reasons, as well as those set out in petitioner's opening brief, the judgment of the Nevada Supreme Court should be reversed, and the injunctions dissolved.

Respectfully submitted,

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